

No. PD-0279-20

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN

FILED
COURT OF CRIMINAL APPEALS
10/19/2020
DEANA WILLIAMSON, CLERK

ANDREW ANDERSON,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from Dallas County

APPELLANT'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

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(on original plea)

Hon. Jennifer Bennett
Judge
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Whether the 10-day grace period for filing a notice of appeal was unavailable when the incarcerated defendant omitted the words “district clerk” from the envelope he used to send his notice of appeal. [CR: 64, 74-76; Op. Ct. App. 2-3; APX-1].

Ground Two

Under what circumstances should an incarcerated defendant be allowed factual development to show the clerk physically received his notice of appeal within the 10-day grace period? [CR: 64, 74-76; Ltr. Br. App. 3].

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW Appellant Andrew Anderson and respectfully submits this brief in support of his Petition for Discretionary Review in No. PD-0279-20 from the Judgment and Opinion of the Fifth District Court of Appeals dismissing his appeal from the 265th Judicial District Court of Dallas County.¹

STATEMENT REGARDING ORAL ARGUMENT

This Court has ordered that oral argument is not permitted.

STATEMENT OF THE CASE

The April 15, 2019 indictment alleged that Appellant committed aggravated assault with a deadly weapon on March 5, 2019. (CR: 11). TEX. PENAL CODE §§ 22.01(a)(2), 22.02(a)(2). The alleged offense was a second-degree felony² that was punishable by confinement from two to 20 years with a possible fine not to exceed \$10,000. TEX. PENAL CODE §§ 12.33, 22.02(a)(2), 22.02(b).

¹ Court of Appeals No. 05-19-01492-CR (Trial No. F19-52721-R).

² The family violence allegation did not elevate Appellant's alleged offense to a first-degree felony because the State alleged deadly weapon use, not serious bodily injury, as the aggravating element. (CR: 11). TEX. PENAL CODE §§ 22.01(a)(1), 22.02(b)(1). The indictment included a family violence allegation only for possible use in any future cases against Appellant. (CR: 11, 65). *See* TEX. PENAL CODE §§ 22.01(a)(1) (stating a person commits assault by causing bodily injury to another); TEX. PENAL CODE § 22.01(a)(b) (stating bodily-injury assault is normally a class A misdemeanor); TEX. PENAL CODE § 22.01(b)(2)(A) (stating bodily-injury family violence assault can be a third-degree felony when the State shows there was a prior conviction which included a family violence finding); TEX. PENAL CODE § 22.01(b-3) (stating bodily-injury family violence assault can be a second-degree felony when there was a prior family violence conviction and the defendant impeded breathing or blood flow of the family violence victim in the instant offense).

On July 25, 2019, the trial court accepted Appellant's negotiated plea of no contest to aggravated assault with a deadly weapon and placed Appellant on eight years' deferred adjudication community supervision. (CR: 11, 30-31, 38-39, 45-52; RR2: 5-8). On August 22, 2019, the State alleged that Appellant violated a condition of his community supervision by having contact with the complainant. (CR: 11, 40-43, 59-60). In proceedings on October 7, 2019, Appellant pleaded true to the revocation allegation without an agreement, and the trial court accepted his plea, granted the revocation motion, adjudicated Appellant guilty, and sentenced him to serve five years' confinement in the Institutional Division of the Texas Department of Criminal Justice. (CR: 64-70; RR2: 8; RR3: 6, 32, 36).

Appellant signed the certification of his right to appeal on October 7, 2019. (CR: 64-65, 71). The county jail mailed Appellant's *pro se* Notice of Appeal to the trial court on November 4, 2019. (CR: 74-76; Appendix 1 (APX-1)). The District Clerk filed Appellant's Notice of Appeal on Monday, December 2, 2020, 56 days after the date of judgment. (CR: 64, 73-76).

On March 17, 2020, the Fifth District Court of Appeals dismissed Appellant's appeal. *Anderson v. State*, No. 05-19-01492-CR, 2020 WL 1303265 *1 (Tex. App. — Dallas Mar. 17, 2020, pet. granted Sep. 16, 2020) (mem. op., not designated for publication). On September 16, 2020, this Court granted Appellant's Petition for Discretionary Review. *Id.*

ISSUES PRESENTED

Ground One

Whether the 10-day grace period for filing a notice of appeal was unavailable when the incarcerated defendant omitted the words “district clerk” from the envelope he used to send his notice of appeal. [CR: 64, 74-76; Op. Ct. App. 2-3; APX-1].

Ground Two

Under what circumstances should an incarcerated defendant be allowed factual development to show the clerk physically received his notice of appeal within the 10-day grace period? [CR: 64, 74-76; Ltr. Br. App. 3; Op. Ct. App. 4 n.1; APX-1-2].

STATEMENT OF FACTS

Appellant was granted deferred adjudication community supervision after admitting that, when he was 31 years old, he committed aggravated assault against complainant, his 23- or 24-year-old girlfriend, by using his vehicle as a deadly weapon to threaten her with imminent bodily injury. (CR: 11, 30-31, 38-39, 55; RR2: 5-8; RR3: 9-10, 13, 15, 32). According to complainant’s testimony at Appellant’s revocation hearing, Appellant initiated contact with complainant as soon as Appellant was released from jail to begin serving his community supervision. (RR3: 11-12, 14). Complainant testified that Appellant interacted with her in various respects: Appellant called her phone to “sit and breath”; during one call that some police officers hear, Appellant threatened to shoot up complainant’s house and kill her and her son; Appellant called complainant’s

father on multiple occasions; Appellant once hacked into complainant's father's telephone and turned it off; Appellant gained unauthorized access to complainant's benefits account, changed her address, and forwarded a fictitious message to her indicating the change would affect her benefits; Appellant sent complainant text messages, including one with his picture; and Appellant sent a friend request and apology video to complainant's new social media account. (CR: 64-70; RR3: 9-19, 21-22; RR4: DX-1, SX-2-7). Appellant admitted sending the apology video to complainant but denied the "other stuff," and he explained that he believed he was in compliance with his conditions as long as he did not have physical contact with her. (RR3: 6-8, 22-29; RR4: DX-1, SX-1).

SUMMARY OF THE ARGUMENT

The Rules of Appellate Procedure require a Notice of Appeal to be directed to the "proper clerk." On the envelope that Appellant used to mail his Notice of Appeal, Appellant stated the addressee as the District Court, without mentioning the "District Clerk." The Court of Appeals violated its duty to accommodate this minor imperfection, considering the District Clerk filed Appellant's Notice of Appeal, the Notice of Appeal stated the felony case number, and Appellant's envelope was addressed to a felony court. If there are unresolved considerations that are material in ascertaining jurisdiction, this Court should direct the Court of

Appeals to allow evidentiary development in the interests of fairness and judicial economy.

ARGUMENT

Ground One

Whether the 10-day grace period for filing a notice of appeal was unavailable when the incarcerated defendant omitted the words “district clerk” from the envelope he used to send his notice of appeal. [CR: 64, 74-76; Op. Ct. App. 2-3; APX-1].

Ground Two

Under what circumstances should an incarcerated defendant be allowed factual development to show the clerk physically received his notice of appeal within the 10-day grace period? [CR: 64, 74-76; Ltr. Br. App. 3; Op. Ct. App. 4 n.1; APX-1-2].

The trial court adjudicated Appellant’s guilt on October 7, 2019. (CR: 64-68; RR2: 8; RR3: 36). Appellant and trial counsel signed the “Trial Court’s Certification of Defendant’s Right to Appeal” on October 7, 2019, wherein the trial court stated that defendant’s conviction did not result from a plea bargain, and Appellant was informed of his right to appeal. (CR: 64-65, 71, 85; RR3: 7). Appellant prepared an instrument stating he “want[s] to appeal the court decision in my case. I don’t agree with it i was lied to and played with and now; would like to appeal my case now my case # F19-52721 in court # 265 please help me do that.” (CR: 74-76; Appendix 1 (APX-1) at 2). Appellant’s Notice of Appeal was

mailed to the trial court on November 4, 2019 with the envelope addressed as follows:

Dallas County Court # 265
133 N Riverfront blvd
Dallas Tx 75207

(CR: 74-76; APX-1 at 1).

On Sunday, December 1, 2020, the trial court's Court Coordinator, Sharon Johnson, notified the Public Defender's Office that Appellant "filed a letter with the court requesting his case to be appealed" and the Public Defender was accordingly appointed. (CR: 73; Appendix 2 (APX-2) at 1). An unknown person prepared a "Defendant's Notice of Appeal and Pauper Oath [and] Appointment of Attorney on Appeal" that was filed by the District Clerk on Monday, December 2, 2020, 56 days after the date of judgment. (CR: 64, 73-76; APX-2 at 2). The December 2, 2020 notice of appeal/pauper's oath form referenced Appellant's attached "letter postmarked 11/4/19," and the trial judge signed an Order at the bottom of the form appointing the Public Defender to represent Appellant. (CR: 74-76; APX-1 at 2 (letter); APX-2 at 2 (notice of appeal form)).

While 28 days elapsed between the day when Appellant's Notice of Appeal was mailed, November 4, 2019, and the day when it was filed by the District Clerk, December 2, 2019, Appellant sent two earlier filings —on May 14, 2019 and July

11, 2019— that were filed by the District Clerk within five days after being mailed.³ (CR: 17-20, 23-24, 27-28, 38-39).

The May 14, 2019 mailing included a cover letter and motion for reduction of Appellant’s offense that were file-stamped on May 19, 2019. (CR: 17-20, 23-24, 27-28, 38-39). The cover letter, which was apparently prepared for Appellant, indicated the address of the District Clerk was “Ms. Felicia Pitre, LB-12[,] Dallas County District Clerk[,]”⁴ Frank Crowley Court’s Bldg.[,] Dallas TX. 75207-4313.”⁵ (CR: 19). The envelope, which was evidently addressed by Appellant personally considering the handwriting in Appellant’s other correspondence and on his envelopes, was addressed to “Ms Felicia Pitre LB-12[,] Dallas County District Clerk[,] Frank Crowley Court Bld[,] 133 N. Riverfront Blvd.” (CR: 19-20, 27-28, 75-76; RR3: 26; RR4: DX-1).

³ On June 11, 2019, the county jail mailed a letter from Appellant to “Sharon Johnson, Chief Clerk[,] Dallas County District Clerk” at “Frank Crowley Court Bldg.[,] 133 N. Riverfront Blvd. Lock Box 30[,] Dallas TX 75207-4313.” (CR: 23-24). Sharon Johnson was the Court Coordinator for the trial court, the 265th Judicial District Court of Dallas County. (CR: 73; APX-2 at 1). This letter was forwarded to the District Clerk by the Coordinator and file-stamped by the District Clerk on June 25, 2019. (CR: 23-24). Based on handwriting comparisons, the letter and the envelope were evidently prepared by someone in the jail on behalf of Appellant. (CR: 19-20, 23-24, 27-28, 75-76; RR3: 26; RR4: DX-1).

⁴ Felicia Pitre has been the District Clerk since 2015. *See* Dallas County Criminal (Felony) Court Section, at <https://www.dallascounty.org/government/district-clerk/criminal-section.php> “Criminal (Felony) Court Section (Tab) (last visited October 14, 2020); Dallas County District Clerk, at <https://www.dallascounty.org/government/district-clerk/meet-the-district-clerk.php> Ballotpedia (last visited October 14, 2020).

⁵The “+4” portion of the zip code for the District Clerk is “-4341.” *See* USPS.COM Quick Tools at <https://tools.usps.com/zip-code-lookup.htm?byaddress> (last visited October 14, 2020).

Appellant sent his July 11, 2019 letter to the trial judge to express concerns regarding Appellant's representation and delay in his case. (CR: 27-28). The District Clerk filed Appellant's July 11, 2019 letter on July 16, 2019. (CR: 27-28).

Perfection via Mailed Notice of Appeal (Grounds One and Two)

A timely notice of appeal sufficient to show the defendant's desire to appeal is necessary to invoke an appellate court's jurisdiction. TEX. R. APP. P. 25.2(b), 25.2(c), 26.2(a)(1); *Slaton v. State*, 981 S.W.2d 208, 210 (Tex. Crim. App. 1998). An appeal is perfected in a criminal case by filing a sufficient notice of appeal within 30 days after the day sentence is imposed or suspended, or within 90 days if the defendant timely files a motion for new trial. TEX. R. APP. P. 25.2(b), 26.2(a)(1). A defendant is eligible for an extension of time to file his Notice of Appeal if he filed his notice of appeal within 15 days after its due date, and filed an extension motion in the Court of Appeals within the same time to "reasonably explain" why his notice of appeal was not timely filed. TEX. R. APP. P. 10.5(b), 26.2(a)(1), 26.3.

Rule 9 of the Texas Rules of Appellate Procedure states the requirements pertaining to filing of documents by mail, including the defendant's notice of appeal. TEX. R. APP. P. 9. *Taylor v. State*, 424 S.W.3d 39, 45–46 (Tex. Crim. App. 2014). Rule 9.2(b)(1) states a document received within 10 days after the filing deadline is considered timely filed when it was 1) mailed to "the proper clerk," 2)

mailed in an envelope or wrapper that was “properly addressed” and stamped, and 3) deposited in the mail on or before the last day for filing. TEX. R. APP. P. 9.2(b)(1)(A)-(C).⁶ An appellate court will accept a legible postmark affixed by the United States Postal Service as “conclusive proof of the date of mailing,” and the appellate court “may consider other proof,” including but not limited to a mailing receipt or certificate. TEX. R. APP. P. 9.2(b)(2), 9.2(b)(2)(A).

When a defendant in custody files a *pro se* notice of appeal by mailing it on or before the due date, the notice of appeal does not have to be received by the clerk within 10 days of the date when it was due. *Campbell v. State*, 320 S.W.3d 338, 341–43 (Tex. Crim. App. 2010). Under the “prisoner mailbox rule” adaptation of Rule 9.2(b)(1) of the Texas Rules of Appellate Procedure, a *pro se* notice of appeal from a defendant in custody is deemed timely filed so long as it was

⁶ Rule 9.2(b) specifies the requirements as follows:

(b) *Filing by Mail.*

(1) Timely Filing. A document received within ten days after the filing deadline is considered timely filed if:

- (A) it was sent to the proper clerk by United States Postal Service or a commercial delivery service;
- (B) it was placed in an envelope or wrapper properly addressed and stamped; and
- (C) it was deposited in the mail or delivered to a commercial delivery service on or before the last day for filing.

TEX. R. APP. P. 9.2(b)(1)(A)-(C) (emphasis in original).

delivered to prison official for mailing on or before its due date, and otherwise complies with Rule 9.2(b). (Lt. Br. State 2). TEX. R. APP. P. 9.2(b)(1)(A)-(C); *Campbell*, 320 S.W.3d at 342–43.

“Proper Clerk” Requirement (Ground One)

The Court of Appeals dismissed⁷ Appellant’s appeal based on Appellant’s failure to include “District Clerk” in the address on his envelope in violation of the requirement for him to direct his Notice of Appeal to the “proper clerk.” (Op. Ct. App. 2; APX-1 at 1). TEX. R. APP. P. 9.2(b)(1)(A); *Anderson*, No. 05-19-01492-CR, 2020 WL 1303265 at *2. The Court of Appeals was not concerned about whether Appellant’s envelope was “properly addressed,” as required under Rule 9.2(b)(1)(B). (Op. Ct. App. 2). TEX. R. APP. P. 9.2(b)(1)(B); *Anderson*, No. 05-19-01492-CR, 2020 WL 1303265 at *2.

The Court of Appeals held that, even if a defendant like Appellant timely mails a notice of appeal within 30 days of the date of judgment, and the district clerk received it within ten days after the filing deadline, it would be untimely if

⁷ The Court of Appeals stated that Appellant had the right to appeal and construed Appellant’s handwritten notice of appeal mailed from the jail on November 4, 2019 as sufficient to indicate Appellant’s desire to appeal. (Op. Ct. App. 1-2). *Anderson v. State*, No. 05-19-01492-CR, 2020 WL 1303265 *1 (Tex. App. — Dallas Mar. 17, 2020, pet. filed) (mem. op., not designated for publication); *Guerrero v. State*, 554 S.W.3d 268, 272 (Tex. App. — Houston [14th] 2018, no pet.); TEX. R. APP. P. 25.2(a)(2), 25.2(c).

“mailed to the trial court judge,” as was done by Appellant.⁸ (Op. Ct. App. 2; Lt. Br. State 2). TEX. R. APP. P. 9.2(b)(1), 9.2(b)(1)(A); *see Anderson*, No. 05-19-01492-CR, 2020 WL 1303265 at **2-3 (citing *Bowen v. State*, Nos. 05-19-01530-533-CR; 2020 WL 1042646 at *1 (Tex. App. — Dallas Mar. 3, 2020, no pet.) (mem. op., not designated for publication)). In *Bowen*, the Court of Appeals concluded it was not relevant that the *pro se* notices of appeals were timely mailed by the incarcerated defendant on the 20th day after the judgments, and file-stamped on the 34th day after the sentences, because the defendant’s envelope indicated the trial judge as the addressee, instead of the District Clerk. *Bowen*, Nos. 05-19-01530-533-CR; 2020 WL 1042646 at *1.

In Appellant’s case, the Court of Appeals violated its duty to apply Rule 9.2(b)(1)(A) of the Texas Rules of Appellate Procedure in in a forgiving manner. TEX. R. APP. P. 9.2(b)(1)(A); *Houston v. Lack*, 487 U.S. 266, 271, 275, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988); *see Campbell*, 320 S.W.3d at 340–43 (emphasizing that inmates “necessarily lose control” to the “vagaries of the mail” and cannot “control or supervise” the clerk’s office to ensure that it properly handles their notices of appeal). Minor imperfections in addressing an envelope should not be considered fatal in order to automatically deprive a prisoner of his

⁸ Appellant mailed a letter to “Judge Jenniffer Bennet court 265” on July 11, 2019. (CR: 27-28). Appellant addressed the envelope for his November 4, 2019 Notice of Appeal to “Dallas County Court # 265,” without mentioning Judge Bennett.

right to appeal. *Taylor v. State*, 424 S.W.3d 39, 44 (Tex. Crim. App. 2014); *Moore v. State*, 840 S.W.2d 439, 440-41 (Tex. Crim. App. 1992) (per curiam). An envelope is sufficient as long as it is “generally” and not inaccurately addressed to the clerk. *See Moore*, 840 S.W.2d at 440 (stating envelope that actually arrived at the clerk’s office was “not improperly addressed”); *Taylor*, 424 S.W.3d at 44 (agreeing the “generally addressed” envelope in *Moore* was adequate). An envelope cannot be considered improperly addressed when it was “sufficiently specific as to be timely received at the proper place.” *Moore*, 840 S.W.2d at 440.

The Court of Appeals employed a fiction against Appellant from *Bowen*: Appellant’s use of the District Clerk’s address without specifying “District Clerk” was insufficient for it to reach the “proper clerk” even though it reached the District Clerk, which was the proper clerk. (Op. Ct. App. 2). TEX. R. APP. P. 9.2(b)(1)(A); *Anderson*, No. 05-19-01492-CR, 2020 WL 1303265 at **2-3; *Bowen*, Nos. 05-19-01530-533-CR; 2020 WL 1042646 at *1. In relying on the *Bowen* fiction, instead of finding that Appellant sufficiently addressed his envelope, the Court of Appeals penalized Appellant for him being unable to be physically present to assure that the clerk filed his notice of appeal. TEX. R. APP. P. 9.2(b)(1)(A); *Campbell*, 320 S.W.3d at 340–43.

In *Moore*, the prisoner sent his cost bond for his appeal bond forfeiture appeal to the “Bond Forfeiture Clerk” located on the second floor of the

courthouse, without specifying whether this “Clerk” was located in the District Clerk’s Office or in the County Clerk’s Office, which were both located on the second floor. *See Moore*, 840 S.W.2d at 339-40 (applying former rule 4(b) of the Texas Rules of Appellate Procedure, now Rule 9.2(b)(1)(A)-(B)).⁹ This Court explained in *Moore* that, because the prisoner’s envelope was not improperly addressed, and the face of the bond indicated the clerk for whom it was intended, the bond was timely in the constructive control of the District Clerk. *Moore*, 840 S.W.2d at 440-41; *see Taylor*, 424 S.W.3d at 44 (stating a “generally addressed” envelope is sufficient). In other words, any notice of appeal should be deemed sent to the proper clerk if a felony cause number or felony court was stated on the motion or envelope. *Moore*, 840 S.W.2d at 440-41.

This Court explained in *Taylor* that the “proper” clerk requirement in Rule 9.2(b)(1)(A) was only meant to preclude defendants from filing their notices of appeal with a clerk for a court that did not exercise jurisdiction or with a “third party” proxy for the trial court clerk. TEX. R. APP. P. 9.2(b)(1)(A); *see Taylor*, 424 S.W.3d at 46) (stating notice of appeal was timely routed to trial court under the Rules of Appellate Procedure despite being sent to the Court of Appeals); *Turner*

⁹ Rule 4(b) stated that any instrument sent “properly addressed” to the “proper clerk” was timely if “tardily” received not more than ten days after it was due. TEX. R. APP. P. 4(b) (former rule). Rule 4(b) “contained substantially the same language as current Rule 9.2(b).” *Taylor*, 424 S.W.3d at 44; TEX. R. APP. P. 9.2(b)(1)(A)-(B); *see* footnote 6, *supra*, at 9.

v. State, 529 S.W.3d 157, 159 (Tex. App. — Texarkana 2017, no pet.) (stating the notice of appeal was not directed to the proper clerk when it was sent to the trial judge’s chambers in Texarkana instead of to the District Clerk’s Office in Bowie County where the defendant was convicted); *Rhodes v. State*, No. 05–16–00921–CR, 2017 WL 3587101 at *2 (Tex. App. — Dallas, Aug. 21, 2017, no pet.) (mem. op., not designated for publication) (stating defendant failed to “file” his notice of appeal by sending it to his attorney).

Rule 9.2(b)(1)(A) should not be applied to deprive Appellant of his appeal on the basis that he failed to specify “District Clerk” on his envelope when Appellant addressed his envelope “generally” to the district clerk, his envelope was not directed to the trial judge by name, his envelope showed he was convicted in felony court, the cause number on his Notice of Appeal showed he was convicted in felony court, the Receiving Department received Appellant’s Notice of Appeal as the District Clerk’s agent and forwarded it to the District Clerk, the District Clerk received Appellant’s notice of appeal and filed it, and the court coordinator considered it “filed” prior to the order appointment counsel. (CR: 73, 75; Op. Ct. App. 2-3; APX-1 at 1-2, Appendix 2 at 1). TEX. R. APP. P. 9.2(b)(1)(A). The Court of Appeals erred in concluding that, because Appellant did not direct his Notice of Appeal to the “proper clerk,” the 10-day late-filing rule would not apply, even if the District Clerk received Appellant’s Notice of Appeal prior to the expiration of

the 10-day grace period. (Op. Ct. App. 2). TEX. R. APP. P. 9.2(b)(1)(A); *Anderson*, No. 05-19-01492-CR, 2020 WL 1303265 at **2-3; *Bowen*, Nos. 05-19-01530-533-CR; 2020 WL 1042646 at *1.

While the Court of Appeals' limited its ruling to the context of the 10-day late-filing rule, this Court is not required, in remanding to the Court of Appeals, to require the Court of Appeals to re-determine jurisdiction in the context of the 10-day late-filing rule. TEX. R. APP. P. 9.2(b)(1), 78.3. The incorrect reasoning of the Court of Appeals would extend to incorrectly preclude Appellant's use of the prisoner mailbox rule, where jurisdiction is established when a *pro se* notice of appeal was deposited with prison officials prior to its due date. *Campbell*, 320 S.W.3d at 342-44. Because Appellant is not precluded from appealing under the "proper clerk" rule, and there is no dispute he deposited his Notice of Appeal with prison officials before its due date, this Court should exercise its discretion to expedite Appellant's appeal by remanding to the Court of Appeals with instructions to proceed directly to the merits. (Lt. Br. State 2). TEX. R. APP. P. 9.2(b)(1)(A), 78.3.

For the reasons shown, this Court should hold that the Court of Appeals erred in concluding that it lacked jurisdiction, sustain Ground One, reverse the dismissal judgment of the Court of Appeals, and remand to the Court of Appeals to proceed to the merits, or in the alternative, to re-determine jurisdiction.

Request for Factual Development (Ground Two)

The Court of Appeals found that Appellant's Notice of Appeal was mailed to the trial court on November 4, 2019, which was within 30 days of the date of judgment. (Op. Ct. App. 3). *Anderson*, No. 05-19-01492-CR, 2020 WL 1303265 at *3. The Court of Appeals rejected Appellant's request for factual development to show the date when Appellant's Notice of Appeal was received by the District Clerk, or by the courthouse Receiving Department, by concluding that Appellant's Notice of Appeal was received on December 2, 2019, the date when it was file-stamped by the District Clerk. (Op. Ct. App. 2-3; Ltr. Br. App. 3). *Id.*

In finding that the District Clerk first received Appellant's Notice of Appeal on December 2, 2019, the Court of Appeals ignored the Court Coordinator's December 1, 2019 e-mail indicating that the District Clerk "filed" Appellant's Notice of Appeal prior to December 1, 2019. (CR: 73; Op. Ct. App. 2-3; APX-2 at 1). It is reasonable to infer from the Coordinator's December 1, 2019 e-mail, combined with the District Clerk receiving two prior filings within five days after they were mailed,¹⁰ that the District Clerk received Appellant's Notice of Appeal prior to the expiration of the 10-day grace period on November 16, 2019. (CR: 17-

¹⁰A motion and cover letter were mailed to the District Clerk on May 14, 2019 and filed on May 19, 2019, and a letter to the trial judge was mailed on July 11, 2019 and filed on July 16, 2019. (CR: 17-20, 27-28). See discussion, *supra*, at 7-8.

29, 23-24, 27-28; APX-2 at 1). While the Receiving Department may have misrouted Appellant's Notice of Appeal, the indications are that the Receiving Department would have received it within five after it was mailed, *i.e.*, by November 9, 2019.

Should this Court decline to determine that Appellant's Notice of Appeal was sufficient under the prisoner mailbox rule, as discussed, *supra*, at 9-10 and 17, this Court should allow Appellant to develop the record to establish the applicability of the 10-day late-filing rule. *See* TEX. R. APP. P. 9.2(b)(1) (stating that mailings sent by the filing deadline are considered timely filed when they are received by the clerk within 10 days of the due date). Appellant should be allowed to present evidence that the District Clerk actually or constructively received his Notice of Appeal on or before November 16, 2019. TEX. R. APP. P. 9.2(b), 9.2(b)(1)(A); *see Taylor*, 424 S.W.3d at 42, 45 (stating it is reasonable to infer an envelope was addressed to a clerk considering that it was actually received by the clerk); *Moore*, 840 S.W.2d at 440 (stating that the courts building mail department is an agent for the District Clerk). The allowance of abatement hearings to foreclose the need for subsequent habeas applications for remotely out-of-time appeals will remedy the consequences of inmates' inability to monitor the clerk's

office, prevent delay,¹¹ and serve judicial economy. TEX. CODE CRIM. PROC. art. 11.07; *Campbell*, 320 S.W.3d at 340–43.

For the reasons shown, this Court should hold that Appellant is entitled to develop the facts and obtain findings regarding the date when his Notice of Appeal was received by the Receiving Department and District Clerk. This Court should sustain Ground Two, vacate the dismissal judgment of the Court of Appeals, and remand to the Court of Appeals for it to order an evidentiary hearing with findings, re-consider jurisdiction on reinstatement, and if applicable, for it to proceed to the merits.

¹¹ Appellant was awarded 170 days back time credit when he was sentenced on October 7, 2019. (CR: 64). Appellant will become eligible for parole in about October of 2021, when he has served one-half of his sentence. TEX. CODE CRIM. PROC. art. 42A.054(c); TEX. GOV'T CODE § 508.145(d)(1)(B); TEX. PENAL CODE § 22.02(a)(2).

CONCLUSION AND PRAYER

Appellant prays this Honorable Court will sustain Ground One, vacate the dismissal judgment, and remand to the Court of Appeals for it to proceed to the merits or re-determine jurisdiction. In the alternative, this Court should sustain Ground Two, remand to the Court of Appeals for it to abate for evidentiary development and findings, re-determine jurisdiction, and consider the merits if applicable. Appellant prays for such further and other relief to which he may be justly entitled.

Respectfully submitted,

Lynn Richardson
Chief Public Defender
Dallas County, Texas

/s/ Christian T. Souza
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(214) 653-3539 (*fax*)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Brief on Petition for Discretionary Review has been sent via electronic mail to the attorney for the State, M. Paige Williams, Assistant District Attorney in the Dallas County District Attorney's Office, 133 N. Riverfront Blvd., Dallas, Texas 75207, at Marcella.Williams@dallascounty.org. A paper copy has been requested to be sent by a support staff member to Stacey Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas, 78711, and/or has been sent via electronic mail, at: information@spa.texas.gov.

/s/ Christian T. Souza
Christian T. Souza

CERTIFICATE OF COMPLIANCE

I certify that this document contains 4,617 words, exclusive of the Appendixes, according to Microsoft Word 2011.

/s/ Christian T. Souza
Christian T. Souza

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN

ANDREW ANDERSON,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from Dallas County


APPENDIX 1 (APX-1)

APPELLANT’S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

Andrew Anderson
#19044645
P.O. Box 660334
Dallas TX 75224

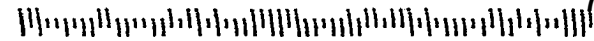
APX-1 p. 1



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Dallas County Court # 265
133 N Riverfront blvd
Dallas TX 75207

75207\$4300 C040



I Andrew Anderson #19044645
I want to appeal the court
decision in my case. I don't
agree with it I was lied to
and played with and now I
would like to ~~appeal~~ appeal my
case now my case # F19-5272
in court #265 please help me
do that.

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN

ANDREW ANDERSON,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from Dallas County

APPENDIX 2 (APX-2)

APPELLANT’S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

APX-2 p. 1

Sharon A Johnson

From: Sharon A Johnson
Sent: Sunday, December 1, 2019 11:27 AM
To: Julie Woods
Subject: appeal

I have appointed the Public Defenders office to an appeal—Andrew Anderson f-1952721
Deft filed a letter with the court requesting his case to be appealed.

Sharon Johnson
Court Coordinator
265th Judicial District Court
6th Floor, Room A-13
214-653-5842
214-653-5846(fax)
sharona.johnson@dallascounty.org

FILED
19 DEC -2 AM 9:37
FELICIA A JUNE
DISTRICT CLERK
DALLAS CO. TEXAS
DEPUTY
BC

Judgment / sentence date
Motion for new trial filed

No ☐ Yes ☐ Date _____

10 PFD-2 11/15/18

Deputy District Clerk

THE STATE OF TEXAS

CAUSE NO. F

19-53724

VS.

JUDICIAL 265th DISTRICT COURT

Andrew Anderson

DALLAS COUNTY, TEXAS

DEFENDANT'S NOTICE OF APPEAL AND PAUPER OATH APPOINTMENT OF ATTORNEY ON APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Defendant in the above cause and states: I am the defendant in the above cause; I was convicted in this cause and now give Notice of Appeal to the Texas Court of Appeals for the Fifth Supreme Judicial District of Texas of Dallas, Texas, and that I am penniless, destitute and indigent person, too poor to employ counsel to represent me on the appeal, and too poor to pay for or give security for the Statement of Facts and a true copy thereof herein. WHEREFORE, I pray that the Court will appoint an attorney to represent me in this appeal and that the Court will order the Court Reporter of this Court to prepare and deliver me or my appointed Counsel the original and a true copy of the Statement of Facts in this case, together with all exhibits attached thereto if practical.

See letter Postmarked 11/15/18
Defendant

BEFORE ME, the undersigned authority, personally appeared the above Defendant, known to me to be the person whose signature appears above, and after being duly sworn on oath states that he is the defendant in the above cause, and that the matters and things set forth in the foregoing are true and correct in all things.

Felicia Pitre
District Clerk
Dallas County, Texas

By

Deputy District Clerk

ORDER

The Defendant having requested the Court to appoint Counsel, it is Ordered the Honorable

Public Def Appeal Address: _____

a regular licensed and practicing attorney of Texas, be, and he/she is hereby appointed to represent Defendant in prosecuting his/her appeal herein, and it is further Ordered that the Court Reporter is hereby directed to transcribe al of the notes as same may appertain to his cause and as taken during the trial of this cause which began on _____ and make Statement of Facts in duplicate and furnish same to defendant or his appointed Counsel.

Judge

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Christian Souza
Bar No. 785414
Christian.Souza@dallascounty.org
Envelope ID: 47282619
Status as of 10/19/2020 9:35 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
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stacy soule		information@spa.texas.gov	10/16/2020 7:18:54 PM	SENT